

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 98-0464

Use Tax

For Calendar Years 1994, 1995, 1996, and Short Year Ended 07/01/97

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ISSUE(S)

I. Use Tax – Imposition

Authority: 45 IAC 2.2-3-4; 45 IAC 2.2-3-8(a); 45 IAC 2.2-3-12; 45 IAC 2.2-3-19; 45 IAC 2.2-3-25

Taxpayer protests the imposition of use tax.

II. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer maintains its headquarters in Cincinnati, Ohio and operates three plants in Indiana. All three plants were sold effective July 1, 1997. The department issued one audit report for all three locations as all accounting records were filed together at one location.

Taxpayer makes no taxable sales, however, upon audit it was discovered the taxpayer failed to self assess use tax for clearly taxable items such as non-production assets, materials incorporated into building and real estate, and general expenses.

Taxpayer submitted a brief in lieu of a hearing scheduled for Tuesday, March 16, 1999 in which it disagrees with the assessment of use tax for construction contracts. During the course of the audit, the

auditor noted that exemption certificates were issued to contractors. Throughout the audit, and thereafter, the taxpayer disagreed with the assessment of use tax.

Taxpayer states that primarily, all contracts were lump sum in nature and as a common policy, taxpayer regards all construction contracts exempt under the theory that real estate is not subject to sales tax. Accordingly, references on purchase orders that the said construction contracts were exempt from sales tax are accurate, and, it should be noted that construction contractors had ample opportunity to determine the proper meaning and exempt status of references on purchase orders but chose not to. Further arguments include that any exemption certificate issued was made by clerical staff with little understanding of Indiana sales tax laws.

Taxpayer states that in general, all sales of real property are not taxable per Rule 45 IAC 2.2-2-8(a); i.e., all construction material purchased by a contractor is taxable to said contractor unless the ultimate recipient could have purchased it exempt per Rule 45 IAC 2.2-3-8 (b); and it could not have purchased the construction material exempt since it did not qualify as a tax exempt organization or otherwise qualify for any other exemption for construction materials.

Taxpayer states that the contractor has the burden of proof to establish an exempt purchase or use of construction material; and, a disposition will be exempt from the use tax only if the contractor received a valid exemption certificate, not a direct pay permit, from the ultimate purchaser or recipient of the construction material (as converted), provided such person could have initially purchased such property exempt from the state gross retail tax, Rule 45 IAC 2.2-3-9 (c), (f).

Several contractors have not provided copies of exemption certificates, therefore in the absence of providing them, the materials are taxable to said contractors and not the taxpayer. Several contractors have provided incomplete exemption certificates necessary for a valid exemption certificate, and any exemption certificate provided by taxpayer to a contractor cannot be considered as valid since contractor has knowledge that taxpayer is a for-profit manufacturer; and by the nature of the construction contract, any valid exemption certificate which could be issued must be a single purchase certificate. Accordingly, all blanket exemption certificates should be considered invalid. Taxpayer further states it consistently issued exemption certificates (only upon request by the construction contractors) under the belief that such certificate would ensure the non-assumption of any responsibility or liability for any sales or use tax under a construction contract. Taxpayer provided a schedule that charts the problems with said exemptions.

I. Use Tax - Imposition

DISCUSSION

Taxpayer protests the assessment of use tax on construction contracts on which exemption certificates were issued in error or were incomplete. As listed in detail under statement of facts, the taxpayer believes it is not subject to tax.

Taxpayer protests that exemption certificates were incomplete, therefore invalid. The taxpayer supplied the contractors with exemption certificates or notation on the purchase order that the project is exempt upon which the contractor relied. No tax was charged the taxpayer. The taxpayer clearly intended that no tax be included in the cost of the contracts.

Pertinently, IC 6-2.5-8-8(a) and (b) specify the purpose and use of sales tax exemption certificates:

(a) A person authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

The disputed exemption certificates were issued by the taxpayer seeking exemption for its purchases. There is no good faith requirement in the above statute. If a customer issues a proper exemption certificate, the seller must accept.

Two issues are salient: (a) Does taxpayer's customized exemption certificate satisfy IC 6-2.5-8-8 (a)'s prescribed "form" element? and (b) Does taxpayer's supplemental data, for those exemption certificates deemed incomplete, satisfy the "manner prescribed" element of IC 6-2.5-8-8(a)?

As discussed above, the taxpayer's purchase order contains a space whether taxable or exempt with a line for the tax exempt number completed when seeking tax exemption. The documents issued by taxpayer to its contractors claiming exemption contained all the material information required on the Department's exemption certificates. This substantially comports with IC 6-2.5-8-8(a).

In several cases blanket ST-105's are on file with taxpayer's vendors, which are backed by purchase orders also, indicating exempt status.

FINDING

Taxpayer's protest is denied.

ISSUE

II. Tax Administration – Penalty

DISCUSSION

Taxpayer requests all penalties be abated because the assessment is approximately one-half of one percent of the actual gross purchases.

Taxpayer's records however, indicate it had a prior audit where no use tax was self-assessed. The Indiana Code and Regulations are clear regarding the self-assessment of tax where no tax is charged.

Taxpayer has not provided reasonable cause to allow the department to waive the penalty. Taxpayer should have had use tax procedures in effect to assure tax is paid.

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is denied for Issues I and II.